Supreme Court, U.S.
FILED
SEP 26 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-206

In The

Supreme Court of the United States

October Term, 1983

CORNELIUS M. WHALEN, T/A TOWSON ASSOCIATES LIMITED PARTNERSHIP, TO ITS OWN USE AND TO THE USE OF ROBERT WHALEN CO., INC.,

Petitioners,

v.

FORD MOTOR CREDIT COMPANY,

Respondent.

BRIEF OF FORD MOTOR CREDIT COMPANY IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Does the death of a judge during trial and prior to the completion of the evidence require a mistrial in the absence of consent by the parties?

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No. 82-296

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FORD MOTOR CREDIT COMPANY,

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BRIEF OF FORD MOTOR CREDIT COMPANY IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

STATEMENT OF THE CASE

In this case the trial judge died shortly after Ford Motor Credit Company ("Ford Credit") began to present its evidence but before the presentation of its principal witnesses, some three weeks prior to the expected end of the six week trial. After a three week hiatus during which the new judge denied Ford Credit's motion for a mistrial,

the case resumed before the original jury and the new judge, whose schedule did not permit him to complete reading the trial transcript until one day prior to the completion of the evidence (J.A. 1681).* In ruling on Ford Credit's motion for a directed verdict at the close of the plaintiff's case, the deceased judge had ruled on some legal issues, but he characterized his own decisions as tentative and subject to change (J.A. 805-6, 819-20).

Those rulings, which were followed by the new judge, as well as other diverse and substantial issues, any of which, if resolved in favor of Ford Credit, would have required a new trial, were presented to the Fourth Circuit. In ordering a new trial, the Fourth Circuit simply ruled that in the absence of consent a mistrial should have been declared when the original judge died before the completion of the evidence. The Fourth Circuit did not reach any of the remaining issues for the following reasons:

> "The Court finds itself with no fixed uniform view on any of the as yet unresolved issues. It accordingly deems it best to defer consideration and any attempt to dispose of them until they come to the court after, rather than before, they have been fully litigated." (App. 14a.).

SUMMARY OF REASONS FOR DENYING THE PETITION

The writ of certiorari has been traditionally utilized by this Court to decide those questions of law whose importance transcends the boundaries of an individual case and about which the federal courts are in disagreement. Measured against those standards, the petition should be denied.

Whether in the absence of consent a mistrial should be granted when a judge dies during trial but prior to the entry of a verdict or findings of fact and conclusions of law

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* J.A. refers to the joint appendix filed in the court below.

is an issue which arises only rarely. When the issue has arisen, the uniform result arrived at by the courts has been that a mistrial must be granted and this is consistent with the intent of the Rules Committee in drafting F.R. Civ. P. 63 and the interpretation of leading commentators.

ARGUMENT

I.

THE ISSUE PRESENTED OCCURS ONLY RARELY AND DOES NOT JUSTIFY CONSIDERATION BY THIS COURT

As the petitioner remarked in the court below, "The rarity of the death of a judge in a civil jury trial before submission of the case to the jury is evidenced by the dearth of authority having considered the issue." (Reply to Petition For Rehearing with Suggestion That The Case Be Reheard En Banc at p. 11). That observation has been a factor in the repeated refusal of the Rules Committee to recommend an amendment to F.R. Civ. P. 63 so as to permit substitution before a verdict has been entered or findings of fact and conclusions of law have been filed.

In 1937, Dean Charles E. Clark (the reporter for the Rules Committee and later the Chief Judge of the Second Circuit) wrote that the Committee only intended Rule 63 to authorize a change of judges after verdict. As he observed, "a broader rule was not approved by the Committee." (May 14, 1937 letter from Charles E. Clark to Major Edgar B. Tolman, Charles E. Clark Papers, Yale University Library).

The Committee again considered the issue during its deliberations in 1953. The chairman, William D. Mitchell, a former Solicitor General and Attorney General of the United States, then observed:

> ". . . there is no law or rule that allows another judge to take over the case on a transcript made by the preceding judge who is now dead. The only way it can be done now is by stipulation. If your adversary

won't consent to that, you have to start your case all over again before another judge."

Although a change to that rule was discussed, Mr. Monte Lehmann observed:

"If I had one case in 15 or 20 years, it would have to be very hard to make me change the rule, I think.

* * * * * *

If you leave it [Rule 63] as it is, as Mr. Mitchell pointed out, it restricts it to cases where a verdict has been returned . . ."

The Committee concluded that no change in the Rule was needed:

"Chairman Mitchell: I have the feeling that maybe we had better leave it alone.

Judge Dobie [of the Fourth Circuit]: I don't think it is vital. Let's pass it.

Judge Clark: All right." (App. 7a-9a)

Again in 1963 the issue was brought to the Committee's attention, but no change in the rule governing civil cases was approved, although at that time a change in the criminal rules was recommended permitting the substitution of a judge in certain conditions. (App. 10a-11a).

If, for the rare case, it is now thought that Rule 63 should be amended, then the issue should be referred to the Rules Committee. Certainly, it is not a matter which presses for the attention of this Court.

II.

THERE IS NO CONFLICT AMONG THE CIRCUITS. THE COURTS HAVE CONSISTENTLY HELD THAT THE LANGUAGE OF RULE 63 REQUIRES A MISTRIAL IN THE ABSENCE OF CONSENT BY THE PARTIES WHEN A JUDGE DIES PRIOR TO A VERDICT OR FINDINGS OF FACT.

All of the circuits, and indeed all courts, which are reported to have had occasion to apply the requirements of

Rule 63 have consistently held that a mistrial is required in the absence of the consent of the parties when a judge dies during the course of a trial. *Arrow-Hart, Inc. v. Philip Carey Co.*, 552 F.2d 711 (6th Cir. 1977); *Havey v. Kropp*, 458 F.2d 1054 (6th Cir. 1972); *Bromberg v. Moul*, 275 F.2d 574 (2nd Cir. 1960); *Brennan v. Grisso*, 198 F.2d 532 (D.C. Cir. 1952); *Ten-O-Win Amusement Co. v. Casino Theatre*, 2 F.R.D. 242 (N.D. Cal. 1942); *Girard Trust Bank v. Easton*, 12 N.C. App. 153, 182 S.E.2d 645 (1971), *cert. denied*, 279 N.C. 393, 183 S.E.2d 245 (1971);* *State Ex. Rel. Lundsford v. Webber*, 153 W. Va. 544, 170 S.E.2d 671 (1969).* There is thus no need for this Court to exercise its jurisdiction to resolve a conflict among the circuits.

While these cases dealt with non-jury proceedings, there is no basis for distinguishing jury cases because Rule 63 makes no such distinction. As stated by the court below:

> "On the contrary, [Rule 63] clearly calls for like treatment: 'After a verdict is returned *or* findings of fact and conclusions of law are filed.'"
>
> (Appendix 3A-4A) (Ccurt's emphasis).

That Rule 63 applies to both jury and non-jury actions is also the conclusion reached by Professor Moore.

> "The death . . . of a judge during a trial and before a verdict is returned in a jury case . . . will, in the absence of the consent of all parties, normally result in a mistrial." *Federal Procedure*, Section 59.08(2).

The conclusion reached by the majority below is further buttressed by examining the contrasting developments of F.R. Crim. P. 25. In 1966, this Court, acting on the recommendation of the Rules Committee, amended F.R. Crim. P. 25 (which was then the identical counterpart to Civil Rule 63) by adopting what is now Criminal Rule

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* Decided under State Rules of Civil Procedure, which have adopted *in haec verba*, the language of Rule 63.

25(a) which, in limited circumstances, permits the substitution of a judge during a criminal trial.* Such a recommendation, as noted by the court below, "Certainly proceeds on the premise that such substitution would not be possible without a Rule change." (Appendix 11a).

After examining the language of Rule 63 and after examining the contrasting development of Criminal Rule 25, the court below concluded, just as all other courts before it had, that "Rule 63 communicates a positive prohibition on substitution of a judge prior to a verdict where, as here, all parties have not stipulated their consent." (App. 13a).

Such a conclusion moots petitioner's reliance on F.R.Civ. P. 1 which states that the rules "shall be construed to secure a just, speedy and inexpensive determination of every action" and F.R. Civ. P. 83 which states in part that "District Courts may regulate their practice in any manner not *inconsistent* with these rules" (emphasis added), because interpreting either rule so as to permit substitution would be inconsistent with the "positive prohibition" found in Rule 63. Moreover, if these general grants of authority are adequate to permit substitution prior to verdict, then they are adequate to permit substitution after verdict and Rule 63 would never have been necessary.

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* Professor Charles Alan Wright has expressed the belief that Rule 25(a) is unconstitutional in permitting the substitution of a judge during a criminal trial over the objection of a defendant. *2 Wright & Miller, Federal Practice and Procedure: Criminal* § 392. *See also, Freeman v. United States*, 227 F. 732 (2nd Cir. 1915). Ford Credit suggested below that petitioner's proposed interpretation of Rule 63 would similarly deprive it of its constitutional rights, but the court's interpretation of Rule 63 made it unnecessary to reach that issue. (App. 3a, fn. 4).

CONCLUSION

There is no compelling reason for this Court to exercise its jurisdiction by granting Petitioners' Writ of Certiorari. There is no conflict among the circuits, but instead, all courts which have been called upon to interpret Rule 63 are in full accord. The decision of the court below will not have a substantial impact upon the judicial systsem as the occasion for the application of Rule 63 is, fortunately, rare. Whether it is desirable to consider amending Rule 63 so as to permit substitution in the rare circumstance when a judge dies during trial is a matter properly considered by the Rules Committee, but is not a matter which should be addressed by this Court in the context of a litigated case. For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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